

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs April 24, 2008

**MARY SUSAN HOLLY v. JIM HOLLY, ET AL.**

**Appeal from the Circuit Court for Marshall County  
No. 17,294 Franklin Lee Russell, Judge**

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**No. M2007-02130-COA-R3-CV - Filed July 9, 2008**

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The trial court denied appellant's request for relief under Tenn. R. Civ. P. 60. Because the trial court acted within the discretion granted it in ruling on such requests and thoroughly considered the applicable legal standards and the circumstances of the request, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Affirmed**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Christopher P. Westmoreland, Shelbyville, Tennessee, for the appellant, Mary Susan Holly.

Patrick A. Flynn, Columbia, Tennessee, for the appellees, Jim Holly and Norma Holly.

**OPINION**

Mary Susan Holly brought suit against her parents, Jim and Norma Holly, for injuries she received while burning brush on the Hollys' property when the brush pile exploded due to a hidden incendiary device. The trial court granted the defendants' motion for summary judgment on June 6, 2007. The trial court later<sup>1</sup> explained its decision, finding that the daughter had volunteered to rake and burn debris in the yard of her physically impaired parents; that she did not immediately burn the debris after it was gathered; and that in the intervening period a neighbor placed a homemade "bomb" beneath the brush pile. In her suit, the daughter alleged that her parents had an affirmative duty to inspect the pile for explosive devices before allowing her to burn it. The trial court concluded:

It is uncontroverted in the record that there was no bomb-planting or other similar activity in the neighborhood before the explosion in question, that the Defendant

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<sup>1</sup>The explanation of the reasons for granting summary judgment was set out in the memorandum opinion denying the post-judgment Tenn. R. Civ. P. 60 motion.

parents had no information whatsoever that alerted them to the danger in the brush pile, and that the parents made no representation to the daughter about the safety of the brush pile. There was no evidence that the parents undertook to inspect the brush pile or indeed that they were physically capable of making such an inspection. Summary judgment was granted under Rule 56 on the grounds that there was no duty to inspect the wood pile for bombs under the undisputed facts in this case, that the presence of the bomb in the pile was not foreseeable, and that the Defendant was entitled to judgment as a matter of law.

Counsel for the plaintiff filed a Notice of Appeal within thirty (30) days of the entry of the judgment, but filed the Notice with the Clerk of the Appellate Courts instead of with the Clerk of the Circuit Court of Marshall County. Tennessee Rules of Appellate Procedure 3(e) and 4(a) require that a notice of appeal as of right must be filed with and received by the clerk of the trial court within thirty days after entry of the judgment appealed from.

The requirement for the timely filing of a notice of appeal to the Court of Appeals with the trial court is jurisdictional. *John Barb, Inc. v. Underwriters at Lloyd of London*, 653 S.W.2d 422, 424 (Tenn. Ct. App. 1983). It cannot be waived by the appellate courts. *Tenn. R. App. P. 2; Edmundson v. Pratt*, 945 S.W.2d 754 (Tenn. Ct. App. 1996). Consequently, Ms. Holly's attempt to appeal the trial court's judgment was ineffective.

After receiving notice from the appellate clerk that the Notice of Appeal had been filed in the wrong office, Ms. Holly's counsel attempted the only available procedural recourse at that time and filed with the trial court a motion to vacate the previously-entered judgment and enter a new judgment. If that motion were granted, Ms. Holly would have a new thirty-day period in which to properly file a notice of appeal. The motion referenced Tenn. R. Civ. P. 60, and stated that according to that rule "a request can be made to allow the filing of the Notice of Appeal even though the deadline has run due to the fact that a simple Clerical Error occurred."

After a hearing, the trial court by order entered September 4, 2007, denied Ms. Holly's motion, stating that she was not entitled to relief under Rule 60.02. The trial court also entered a thorough memorandum setting forth its reasons for denial of the motion and discussing prior holdings regarding Rule 60. Ms. Holly appeals that denial.

Although the Rule 60 motion mentioned "clerical error" as a justification for relief, thereby implicating Tenn. R. Civ. P. 60.01, the trial court analyzed the motion under Tenn. R. Civ. P. 60.02. We agree with the trial court that the plaintiff's only available means of redress is through Rule 60.02 because the attorney's error in filing the notice of appeal with the wrong clerk is not the type of "clerical mistake" that would make Rule 60.01 applicable.<sup>2</sup>

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<sup>2</sup>Rule 60.01 refers to "Clerical mistakes in judgments, orders or other parts of the record, and errors therein arising from oversight or omissions."

Relief under Rule 60.02 is considered “an exceptional remedy” and not a routine one. *Nails v. Aetna Ins. Co.*, 834 S.W.2d 275, 294 (Tenn. 1992); *Fielder v. Lakesite Enters. Corp.*, 871 S.W.2d 157, 159 (Tenn. Ct. App. 1993). The purpose of Rule 60 is to alleviate the effect of an oppressive or onerous final judgment, while also balancing the competing interests of justice and finality. *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 231 (Tenn. Ct. App. 2000). “Rule 60.02 acts as an escape valve from possible inequity that might otherwise arise from the unrelenting principal of finality embedded in our procedural rules.” *Thompson v. Firemen’s Fund Ins. Co.*, 798 S.W.2d 235, 238 (Tenn. 1990). While the rule is designed to allow the trial court to balance the competing interests of justice and finality, “[b]ecause of the importance of this ‘principle of finality,’ the ‘escape valve’ should not be easily opened.” *Banks v. Dement Constr. Co., Inc.*, 817 S.W.2d 16, 18 (Tenn. 1991) (quoting *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991)).<sup>3</sup>

Although Rule 60.02 gives the courts broad authority, “this power ‘is not to be used to relieve a party from free, calculated and deliberate choices it has made.’” *Federated Ins. Co. v. Lethcoe*, 18 S.W.3d 621, 625 (Tenn. 2000) (quoting *Banks v. Dement Constr. Co.*, 817 S.W.2d at 19); *see also Cain v. Macklin*, 663 S.W.2d 794, 796 (Tenn. 1984); *Magnavox Co. of Tenn. v. Boles & Hite Constr. Co.*, 583 S.W.2d 611, 613 (Tenn. Ct. App. 1979).

Whether to grant relief pursuant to Rule 60.02 is a matter within the trial court’s discretion, and the trial court’s decision will be reversed only for abuse of that discretion. *Lethcoe*, 18 S.W.3d at 624; *Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993); *Toney*, 810 S.W.2d at 147; *Ellison v. Alley*, 902 S.W.2d 415, 418 (Tenn. Ct. App. 1995). “A trial court abuses its discretion when it applies an incorrect legal standard or reaches a decision which is against logic or reasoning and which causes an injustice to the complaining party.” *Doe I ex rel. Doe I v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 42 (Tenn. 2005). Under the abuse of discretion standard, a trial court’s ruling “will be upheld so long as reasonable minds can disagree as to propriety of the decision made.” *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000) (citing *Overstreet v. Shoney’s Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999)).

Ms. Holly’s motion must be considered to have been made under either the first or the fifth clause of Tenn. R. Civ. P. 60.02. Despite its broad language, Tennessee courts have very narrowly construed Tenn. R. Civ. P. 60.02(5). *Lethcoe*, 18 S.W.3d at 625; *Underwood*, 854 S.W.2d at 97; *Henderson v. Kirby*, 944 S.W.2d 602, 605 (Tenn. Ct. App. 1996). The standards of Rule 60.02(5)

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<sup>3</sup> Rule 60.02 reads in relevant part:

On motion and upon such terms as are just, the court may relieve a party or the party’s legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken.

are more demanding than those applicable to the other grounds for relief under the rule. *NCNB Nat'l Bank of N.C. v. Thrailkill*, 856 S.W.2d 150, 154 (Tenn. Ct. App. 1993). Relief under Rule 60.02(5) is only appropriate in cases involving extraordinary circumstances or extreme hardship. *Lethcoe*, 18 S.W.3d at 624 (citing *Underwood*, 854 S.W.2d at 97); *Banks*, 817 S.W.2d at 19. Accordingly, the trial court appropriately denied relief under subsection (5) of Rule 60.

With regard to subsection (1), Ms. Holly's motion must rest on the ground of mistake, inadvertence, or excusable neglect. While some courts might be inclined to grant relief on the facts of this situation so as to allow an appeal, the question before us is whether the trial court herein abused its discretion in denying that relief.

The trial court filed a thorough memorandum explaining its decision on the Rule 60 motion in which the court considered and discussed a number of opinions regarding inadvertence and excusable neglect under Tenn. R. Civ. P. 60.02(1), including *Belcher v. Rogers*, No. E1999-01844-COA-R3-CV, 2000 WL 816808 (Tenn. Ct. App. 2000), wherein this court considered a similar situation. The appellant in that case also filed the notice of appeal in the Court of Appeals, and the notice was not filed in the trial court within the thirty day deadline. The appellant's counsel filed an affidavit in support of his Rule 60 motion for relief stating that the Notice of Appeal was "erroneously addressed" to the clerk of the appellate court. The trial court denied the motion for relief, and this court affirmed that denial.

In *Belcher*, this court cited and quoted from several cases where a notice of appeal was improperly filed and the attorney's uncertainty as to how to proceed or lack of knowledge of the applicable rules were held insufficient to constitute excusable neglect. *See, e.g., Food Lion, Inc. v. Washington County Beer Bd.*, 700 S.W.2d 893 (Tenn. 1985); *First Nat'l Bank of Polk County v. Goss*, 912 S.W.2d 147 (Tenn. Ct. App. 1995); *Kilby v. Sivley*, 745 S.W.2d 284 (Tenn. Ct. App. 1987). The trial court closely examined other cases regarding Rule 60 relief from a failure to properly file a notice of appeal, including *Dockery v. State*, No. M2006-0014-COA-R3-CV, 2007 WL 2198195 (Tenn. Ct. App. July 23, 2007). In *Dockery*, this court emphasized that the party seeking Rule 60 relief had the burden of proving that such relief was warranted and that "[t]he bar for obtaining relief is set very high, and the burden borne by the moving party is heavy." *Id.* at \*2 (citing *Johnson v. Johnson*, 37 S.W.3d 892, 895 (Tenn. 2001)). Based upon the inability of the movant's lawyer to explain why the notice of appeal was sent to the Court of Appeals, this court held that it could not say the Claims Commission acted outside its discretion in refusing to find that the movant had established excusable neglect. *Id.* at \*5.

In the case before us, the trial court noted that counsel had declined to present proof of an explanation for the failure to file the Notice of Appeal in the trial court, but stated counsel had cited his lack of experience in handling appeals as well as the short period of time he has practiced law. The trial court concluded that no ground for relief under Tenn. R. Civ. P. 60.02 had been established.

It is clear that the trial court carefully considered the applicable legal standards and acted well within its discretion in ruling on a Tenn. R. Civ. P. 60 motion. Accordingly, we affirm the judgment of the trial court. Costs on appeal are taxed to the appellant, Mary Susan Holly.

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PATRICIA J. COTTRELL, P.J., M.S.